

and Dori Derr ("appelles" or "Derrs") have opposed the motion. For the reasons set forth below, the Court will remand this case to the territorial court for a *Poulis* hearing.

I. FACTS

On or about July 19, 1995, Myers bought a parcel of land from Rudolph Galiber, a local surveyor and a former Commissioner of Public Works, for \$29,000. Myers received the deed and a composite map detailing the boundaries of his property and that of the Derrs. A subsequent appraisal valued Myers' property at \$33,000. Myers had planned to use this property for his home as he was in the process of moving out of his rental property.¹

Sometime after the purchase, Myers observed a bulldozer digging and removing the dirt on his property. He confronted an individual who, upon information or belief, was appellee Dori Derr and informed her that her bulldozer operator was destroying his property. According to Myers, Mrs. Derr responded by telling him that he did not know what he owned. Myers protested, but was unable to obtain counsel at the time due to financial constraints.

¹ Myers' former landlord had informed Myers of his intent not to renew the lease. (Appellant App. at 27.)

Myers hired Brian Mosely, a surveyor, to survey his property. Mosely concluded that the Derrs had in fact encroached on Myers' property and caused monetary damage of \$24,500--Mosely estimated the present value of the land at \$8,500. Myers also hired a bulldozer operator to grade the property in order to move his trailer home onto the property. The operator, however, noted that the way in which the Derrs had cut into the property may cause large boulders to roll onto and possibly destroy the improvements to the Derr property. Accordingly, the operator refused to grade the property. As Myers was unable to level his property, he could not remove his trailer from its location and was then subject to eviction proceedings commenced by his former landlord.

II. PROCEDURAL BACKGROUND

This appeal stems from two separate actions, which were later consolidated and resulted in Myers' failure to prosecute. These actions were: *Derr v. Moran et al.*, Terr. Ct. Civ. No. 96-532 (the "Derr action"); and *Myers v. Derr*, Terr. Ct. Civ. No. 97-878 (the "Myers action").

A. Derr v. Moran

On July 31, 1996, the Derrs filed a claim for quiet title of the property in question and further sought damages for negligent surveying and the negligence of certain realtors in describing the bound posts for the property. The counsel of record for all the defendants² was Marshall A. Bell. On August 12, 1996, Myers allegedly³ filed an answer to the Derr's complaint as well as a counterclaim seeking damages for encroachment--the counterclaim was identical to the claims of the Myers action. On February 10, 1998, Attorney Bell sought to withdraw as counsel for Myers. The court granted this motion provided that he notify Myers of his intent to withdraw as counsel. Moreover, the court scheduled this case for trial on February 27, 1998. On February 18th, Attorney Bell mailed the notice to withdraw as counsel to Myers'

² The defendants were Terry Moran (president of Terry Moran Real Estate Co.), Paul Hytonen (employee/agent of Terry Moran Real Estate Co.), Rudy Galiber (seller of Myer property) and James Myers.

³ The term "allegedly" is used because Attorney Bell was not authorized to act as counsel for Myers. See *Derr v. Moran et al.*, Civ. No. 96-532 (Terr. Ct. Apr. 26, 2000) (order vacating dismissal against Myers because he "never authorized Attorney Marshall A. Bell to represent him in this matter"). Myers signed an affidavit claiming that he "never retained nor requested that Attorney Marshall Bell file any kind of action on my behalf" and that he "never consulted with Attorney Marshall bel to represent me in any legal capacity whatsoever." (Appellant Aff., June 6, 1997.) Myers did, however, admit to receiving intermittent documents from Attorney Bell pertaining to the Derr action. See *id.* It appears that Bell was acting primarily as counsel for the other parties to the Derr action--Moran, Hytonen and Galiber--as he filed the answer and counterclaims on behalf of all the defendants. A review of the filings on behalf of Myers by Attorney Bell also lead to the conclusion that he was not actually involved in the Myers action as his name was continually misspelled--"Mayer" instead of "Myers."

post office box. On February 27th, neither Myers nor his counsel, Wayne Sprauve, appeared at trial. A settlement was reached among the Derrs and the remaining defendants. The court dismissed Myers' counterclaims for failure to prosecute and struck his answer from the record. No appeal was taken from this order of dismissal. The Territorial Court, however, later made findings of fact on April 26, 2000 and concluded that Myers was never served with notice of the complaint and that he never authorized Attorney Bell to represent him in that matter. The trial court, therefore, vacated the dismissal regarding Myers. See *Derr v. Moran et al.*, Civ. No. 96-532 (Terr. Ct. Apr. 26, 2000) (order vacating dismissal).

B. Myers v. Derr

On November 10, 1997, Myers filed an action against the Derrs for encroachment. Myers also filed a temporary restraining order ("TRO") to stop the Derrs from bulldozing his property. On February 11, 1998, the Territorial Court denied the TRO and set the trial date for the 27th-the same date and time as the Derr action. On February 27th, Myers and his counsel failed to appear. The Derrs moved to dismiss for failure to prosecute, which the court granted on May 28th. On June 3rd, Myers filed a timely notice of appeal.

III. DISCUSSION

This Court has jurisdiction to review the judgments and orders of the Territorial Court in all civil cases pursuant to 4 V.I.C. § 33. Appellant argues that the Territorial Court erred in dismissing the Myers action for failure to prosecute. In essence, appellant argues that the trial court should have looked to the holding in *Poulis v. State Farm Fire & Casualty Co.*, 747 F.2d 863 (3d Cir. 1984) to determine whether a dismissal was warranted. Appellees counter that the dismissal was valid because: (1) the trial court did not abuse its discretion in dismissing the Myers action for failure to prosecute; (2) the dismissal of the Derr action bars the underlying action based on the doctrine of res judicata; (3) Myers failed to avail himself on Federal Rule 60(b), which permits a party to file a motion with the trial court seeking relief from a final judgment or order for "mistake, inadvertence, surprise, or excludable neglect;" (4) Myers is not without remedy as he can bring an action against his counsel for malpractice; and (5) there can be no further explication of reasons for dismissing the Myers action as the original sitting judge is no longer on the bench. A review of the appellees' arguments reveal that each is without merit.

A. Abuse of Discretion

In *Poulis*, the Third Circuit Court of Appeals stated that "[d]ismissal is a drastic sanction and should be reserved for those cases where there is a clear record of delay or contumacious conduct by the plaintiff." *Poulis*, 747 F.2d at 866 (citing *Donnelly v. Johns-Manville Sales Corp.*, 677 F.2d 339, 342 (3d Cir. 1982); see also *Dunbar v. Triangle Lumber & Supply Co.*, 816 F.2d 126, 128 (3d Cir. 1987) ("We have cautioned that dismissal in [the context of failure to prosecute] is a drastic tool and may be appropriately invoked only after careful analysis of several factors, including [the *Poulis* factors]").⁴ Accordingly, the Court of Appeals created a six-part test to determine whether a trial court abused its discretion in dismissing a claim. The factors a court should weigh are:

- (1) the extent of the *party's* personal responsibility;
- (2) the *prejudice* to the adversary caused by the failure to meet scheduling orders and respond to

⁴ The *Poulis* court added:

We recognize that recent literature exhorting the district judges to move litigation expeditiously by taking firm control and the 1983 amendments of the Federal Rules of Civil Procedure with their numerous references to sanctions may have contributed to premature dismissals or defaults. Although sanctions are a necessary part of any court system, we are concerned that the recent preoccupation with sanctions and the use of dismissal as a necessary "weapon" in the trial court's "arsenal" may be contributing to or effecting atmosphere in which the meritorious claims or defenses of innocent parties are no longer the central issue.

Poulis, 816 F.2d at 867.

discovery; (3) a *history* of dilatoriness; (4) whether the conduct of the party or the attorney was *willful* or in *bad faith*; (5) the effectiveness of sanctions other than dismissal, which entails an analysis of *alternative sanctions*; and (6) the *meritoriousness* of the claim or defense.

Poulis, 747 F.2d at 868 (emphasis in original). A look at the record reveals that the trial court failed to address any of these issues. Accordingly, it appears that the trial court did abuse its discretion in dismissing the Myers action for failure to prosecute.

Derr argues that a trial court is not always required to look to the *Poulis* factors. Derr contends that "consideration of *Poulis* factors dealing with consequences of party's failure to prosecute or defend is required *if a motion to lift the default or for relief from judgment is filed* and if a record is supplied that will permit consideration of the factors." (Appellees' Supp. Br. at 8.) (emphasis in the original) Derr relies on the holding of *Anchorage Associates. v. Virgin Islands Board of Tax Review*, 922 F.2d 169 (3d Cir. 1990), where the Court of Appeals stated:

When a party having the burden of proof files a motion for summary judgment to which there is no response, and the court determines that the moving party is entitled to judgment as a matter of law based on the facts presented in the motion, we believe that neither a hearing nor consideration of the *Poulis* factors are required before judgment is entered.

Id. at 176. Despite its apparent strength, the Derrs' argument is misguided as *Anchorage* is readily distinguishable. First, the

Derrs did not have the burden of proof in the Myers action. The Derrs were the plaintiffs in their own action, but were the defendants in the Myers action. Therefore, the first part of above quote does not appear to apply. Second, the trial court dismissed the Myers action for failure to prosecute, not "based on the facts presented in the motion." *Id.* Thus, as this was not a Rule 56 motion for summary judgment, a court cannot simply ignore the *Poulis* factors. The District Court of the Virgin Islands concurs with such a conclusion. In *Andrews v. Government of the Virgin Islands*, 25 V.I. 284 (D.V.I. 1990), the court stated that "[i]n deciding defendant's motion to dismiss plaintiffs' complaint for want of prosecution pursuant to Fed. R. Civ. P. 41(b), this Court must weigh and balance the six factors provided by the Third Circuit in *Poulis*." *Id.* at 293.⁵ Finally, the Derrs ignore subsequent language in *Anchorage* that provides exceptions to the court's holding that the *Poulis* factors are not always required.

Depending on the record before the court, consideration of one or more of the *Poulis* factors may be required when a party moves under Rule 37(b)(2) for dismissal of an opponent's claim as a sanction for a failure to

⁵ The *Andrews* court went on to add: "Before deciding a motion to sanction a party with dismissal, the Court must ensure that the party against whom it is being sought has actual notice of the motion." *Andrews*, 25 V.I. at 294. The Territorial Court had consolidated the Derrs and Myers actions for trial on February 27, 1998. That court later acknowledged that Myers had no notice of the Derrs action or that it had been set for trial.

respond to discovery, . . ., when a defendant moves under Rule 41(b) for an involuntary dismissal as a sanction for a failure to prosecute, . . ., or when a plaintiff moves under Rule 55(b) for a default judgment as a sanction for a failure to plead or otherwise defend,

Anchorage Assocs., 922 F.2d at 177 (internal citations omitted) (emphasis added). As the Derrs moved to dismiss Myers action under Rule 41(b) for failure to prosecute, the Territorial Court should have considered the *Poulis* factors before it dismissed the case.

B. Res Judicata

Appellees argue that the dismissal of the Derr action precludes appellant from bringing this present action based on the doctrine of res judicata because the underlying facts and issues are identical. (Appellees' Br. at 12-13.) This argument, however, has been mooted. On April 26, 2000, the Territorial Court concluded that Myers never received notice of the Derr action and was represented by an unauthorized attorney-Attorney Bell. See *Derr v. Moran et al.*, Civ. No. 96-532 (Terr. Ct. Apr. 26, 2000) (order vacating dismissal). Accordingly, the court vacated its dismissal order in relation to Myers and struck his answer to the complaint as well as the counterclaim. See *id.* Therefore, as there is no longer a final order in relation to Myers, the res judicata argument is no longer relevant.

C. Federal Rule 60(b)

The Derrs argue that Myers' failure to invoke Federal Rule 60(b) precludes him from asking this Court to consider the issues raised on appeal. This rule provides: "On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; . . . (6) any other reason justifying relief from the operation of the judgment." Fed. R. 60(b). The Derrs argue that Myers should have brought a Rule 60(b) motion before the trial court, and that by failing to do so, he cannot ask this Court to make factual findings based on an incomplete record. (Appellees' Supp. Br. at 5-9.) Although this argument makes legal sense, it is irrelevant. As the trial court failed to take the *Poulis* factors into account when it dismissed the Myers action, the action should be remanded for a hearing on those factors.

C. Malpractice claim

The Derrs also argue that there is no reason to reexamine the Territorial Court's decision because he may have a claim against his attorney for malpractice. In other words, affirming the dismissal will not leave Myers without a remedy. (*Id.* at 13-14.) This argument is without merit. The *Poulis* court

specifically rejected such a contention. "It does not further the goal of a court system, that of delivering evenhanded justice to litigants, to suggest, as did the district court here, that the plaintiffs would have a remedy by suing their counsel for malpractice, . . . since this would only multiply rather than dispose of litigation." *Poulis*, 747 F.2d at 867. Therefore, such a contention will fail to justify upholding the Territorial Court's dismissal of the Myers action.

D. Judge no longer sitting

Finally, the Derrs argue that as the trial judge is no longer sitting on the territorial bench, there would be "simply no way that [he] could elaborate or explain in further detail the reasons for the decision to dismiss this action." (Appellees' Supp. Br. at 13.) This argument, however, seems irrelevant. The *Poulis* factors comprise an objective test. Moreover, these factors direct a court to look to the actions of the plaintiff and defendant, not the judge.

For these reasons, the Court finds that the Territorial Court erred in failing to look at the *Poulis* factors before dismissing the Myers action. Therefore, we will remand this case back to the trial court for such a hearing.

CONCLUSION

The Court will vacate the dismissal of the Myers action and remand it back to the Territorial Court for a *Poulis* hearing.

ENTERED this 15th day of August, 2001.

ATTEST:
WILFREDO MORALES
Clerk of the Court

By: _____/s/_____
Deputy Clerk

IN THE DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN
APPELLATE DIVISION

James Myers,)	
)	CIV. APP. NO. 1998-112
Appellant,)	
)	Re: Terr. Ct. No. 876/1997
v.)	
)	
James Derr and Dori Derr)	
)	
Appellees.)	
)	

ATTORNEYS:

Herbert Muriel, Esq.
St. Thomas, VI
Attorney for Appellant

James Derr, Esq.
St. Thomas, VI
Attorney for Appellee

ORDER

PER CURIAM.

For the reasons set forth in the foregoing Memorandum of even date, it is hereby

ORDERED that the Territorial Court's dismissal of this matter is **VACATED**; and it is further

ORDERED that this matter is **REMANDED** to the Territorial Court for a hearing on the *Poulis* factors.

ENTERED this 15th day of August, 2001.

ATTEST:
WILFREDO MORALES
Clerk of the Court

By: _____/s/_____
Deputy Clerk

Copies to:
Hon. Raymond L. Finch
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James Derr, Esq.
Michael Hughes, Esq.